No. 13 Consolidated with No. 15

IN THE

# Supreme Court of the United States

October Term, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

*Appellants*

*v.*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,

*Appellees*

On Appeal From the United States District Court for the Eastern District of Louisiana, New Orleans Division

# BRIEF FOR APPELLANTS.

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# Supreme Court of the United States

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THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

*Appellants*

*v.*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,

*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

## BRIEF FOR APPELLANTS

### OPINIONS BELOW

The opinion of the District Court (A. 325) is reported at 270 F. Supp. 695. The initial report of the Interstate Commerce Commission (A. 18) and its supplemental report (A. 176) are published at 325 I.C.C. 1 and 325 I.C.C. 449, respectively.

## JURISDICTION

The final decree of the District Court was entered on August 22, 1967 (A. 357). These Appellants filed their notice of appeal in the District Court on October 2, 1967 (A. 5, 367). On March 4, 1968 this Court noted probable jurisdiction and consolidated this appeal and the appeal of the Interstate Commerce Commission (No. 938) from the same judgment (390 U.S. 940). The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b). *New England Divisions Case,* 261 U.S. 184 (1923); *Baltimore & O. R. Co. v. United States,* 298 U.S. 349 (1936); *Chicago & N.W. R. Co. v. A., T. & S. F. R. Co.,* 387 U.S. 326 (1967).

## STATUTES INVOLVED

Sections 1(4) and 15(6) of the Interstate Commerce Act (49 U.S.C. §§ 1(4) and 15(6)) and Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 557(c) and 706) are set forth in Appendix A of this brief.

Section 15(6) of the Interstate Commerce Act, which implements a general duty imposed upon common carriers by railroad in Section 1(4) of the Act, provides as follows:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. • • •. In so prescribing and

determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

## QUESTIONS PRESENTED

The District Court set aside orders (herein termed "order") entered by the Interstate Commerce Commission in proceedings held pursuant to Section 15(6) of the Interstate Commerce Act. The order found existing divisions of joint railroad rates for the carriage of all freight (other than coal and coke and certain trailer-on-flatcar traffic, excluded by the parties) between Official Territory and Southern Territory, to be unjust, unreasonable, and inequitable and prescribed new divisions which the Commission found would be just, reasonable, and equitable for the future.[1] Over 200 railroads, respondents in the principal proceeding, were involved, but the case was tried by the parties and decided by the Commission as a controversy between two contending groups of rail carriers—Eastern (or Northern) railroads and Southern railroads. Having found all other elements requiring consideration to be in balance as between the two groups, the Commission prescribed the new divisons with reference to the relative costs of the services involved to the Northern and Southern lines. The District Court set aside the said order and remanded the cause to the Commission for further proceedings.

The questions presented are these:

1. Whether the District Court disregarded established standards of judicial review by rejecting as insufficiently

1. Official Territory is comprised of the area lying generally east of the Mississippi River and north of the Ohio River, and certain points in Virginia. Southern Territory lies generally east of the Mississippi River and south of Official Territory.

A joint rate is one that extends over the lines of two or more carriers, and is established by the participating carriers either by agreement or pursuant to an order of the Commission. *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 139-140, note 2; *Chicago & N.W. Ry. Co. v. A., T. & S. F. Ry. Co.*, 387 U.S. 326, 331. The joint rate paid by the shipper is divided among the participating carriers, and the shares of the rate received by them are known as "divisions." *St. Louis Southwestern Ry. Co. v. United States, supra; New England Divisions Case*, 261 U.S. 184, 187.

refined the relative costs that the Commission found, on substantial evidence, to be adequate and reasonably accurate and reliable for the purpose of establishing new divisions, and by holding that the Commission was obligated as a matter of law to develop more refined cost data described by the District Court as the "actual cost of handling the specific traffic at issue."

2. Whether when the Commission, for the purpose of prescribing just, reasonable and equitable divisions of joint rates, makes findings of relative costs on a fully-distributed basis and includes therein a pro rata share of passenger service deficits, it is required as a matter of law in determining such relative costs to consider only passenger expenses which would remain to be borne by freight service if passenger operations were discontinued, and whether there was any error prejudicial to the Southern railroads in the Commission's treatment of passenger service deficits.

3. Whether the District Court improperly equated such overhead costs as are an integral part of fully-distributed costs with general revenue needs and as a consequence erred in holding that the Commission having adopted a relative cost basis for determining fair divisions, acted without findings and substantial evidence in relying upon relative costs which reflected an appropriate proportion of the deficits from all passenger operations including suburban service.

4. Whether the District Court erred in remanding the cause to the Commission without retaining jurisdiction to require equitable resettlements of revenues received by the parties from interterritorial freight rates in the event of a further order of the Commission on remand.

## STATEMENT

### I. Proceedings Before the Commission.

The Appellants are the railroads which operate in Official Territory, here called Northern lines. They intervened as defendants in the action brought by the Southern lines to set aside an order of the Interstate Commerce Commission which prescribed just and reasonable divisions of freight rates having application on virtually all freight moving between the North and the South. The Southern lines, Appellees here and Plaintiffs in the Court below, are joined in their attack on the validity of the Commission's order by the Southeastern Association of Railroad and Utilities Commissioners and the Southern Governors' Conference (herein collectively termed "the Conferences").

Twenty-one years ago, on July 17, 1947, the Northern lines began their efforts before the Interstate Commerce Commission to obtain divisions of the freight rates applying between Official and Southern territories which would give recognition to relative costs of service. On that date Northern lines filed a petition for further hearing in I.C.C. Docket No. 24160, *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175 (1939). There the Commission had prescribed divisional factors for Southern lines that were 25% higher on general traffic, and from 31% to 72% higher on Florida vegetables than the factors prescribed for the Northern lines; and in *Atlantic Coast Line R. Co. v. Arcade & A.R. Corp.*, 194 I.C.C. 729 (1933), 198 I.C.C. 375 (1934), the Commission had prescribed divisions of rates on Florida citrus fruit which were from 47% to 85% higher for Southern than for Northern lines.

In consequence of the petition of July 17, 1947 the Commission instituted the investigation in which—seventeen years later and after an initial major decision—the order here under review was entered. The proceeding is

entitled *Official-Southern Divisions*, I.C.C. Docket No. 29885. In its original decision (287 I.C.C. 497, January 12, 1953), the Commission concluded that if it were to give controlling weight to the 1946 and 1948 Rail Form A cost studies of the Northern lines the relatively higher divisions sought by those lines would have been justified. But it did not accept them at face value because it believed that certain important items of expense in the years involved might reasonably be regarded as transient. Upon appraisal of the Form A cost data for the years studied and the facts of record it considered it to be the safest assumption for the future that neither group of railroads would have an appreciably lower basis of operating costs than the other, and that no other relevant circumstances of importance justified higher divisional factors for one group than the other (p. 526).

Accordingly, the divisional scale prescribed in the 1953 decision accorded the Southern and Northern lines equal divisions for equal mileage hauls north and south of the dividing points.

In 1959 the case was reopened by the Commission upon petition of the Northern lines for modification of the 1953 order to give recognition, principally, to Northern lines' higher costs of service, which the experience of the intervening years had confirmed.

In the period from September 1959 to February 1961 evidence was taken in the form of verified statements and exhibits, with oral hearings for cross-examination. Eighty verified statements were received, many of them voluminous. There were thirty exhibits independent of the verified statements, and the hearings for cross-examination produced approximately 2700 pages of testimony. All of this evidence made up what the Court below called "this massive record" (A. 348). Lengthy briefs were filed by the parties, and then followed the report of the two Hearing Examiners recommending divisional factors for Northern lines higher than those for Southern lines. Exceptions to the report and replies thereto were filed by both groups

of parties and the case was argued orally before the Commission.

In its decision, dated February 3, 1965, the Commission found the Northern lines' cost of performing the service involved to be relatively higher than that of the Southern lines (A. 78). It found other factors to be substantially equal, and predicated its ultimate conclusion upon its determination of the relative costs of performing the service. Hence it prescribed divisional scales which are higher for equal distances for Northern lines than for the Southern lines to the extent that the Northern lines' costs were found to be higher.

Ten of the eleven Commissioners joined in the Commission's report and one dissented, in part. The dissenting Commissioner agreed that the Northern lines should have higher divisions than Southern lines, but he objected to the amount of the increase awarded (A. 86). It is stipulated by the parties that overall the divisions and revenues of the Southern lines from the traffic involved were reduced approximately 3% (A. 200-201). While generally the divisions of Northern lines were increased, the difference in the construction of the new scales as compared with the old resulted in the reduction of many divisions of Northern lines, with corresponding increases in the divisions of Southern lines (A. 201).

## II. Review of Commission's Findings.

The report now before the Court shows that the case was considered thoroughly by the Commission. The details of the findings will be reserved for such discussion as may be required in connection with particular points, but a brief summary of the report would seem desirable at this point.

Beginning at A. 25 the Commission described the traffic studies submitted by the parties, studies which are designed to show the characteristics of the traffic which moves under the rates to be divided. It is the traffic study which fur-

nishes the data (such as type of equipment, weight thereof, tons, ton-miles, cars, car-miles, number of interchanges, etc.) to which unit costs are applied. The Commission agreed with a high appraisal which Southern lines put on their own traffic study [2] (A. 24-25), and it used that study in its determination of the relative service costs (A. 48).

After finding that the evidence contained typical and ample representations of the roads involved, covering typical movements for a normal annual period, and that the detailing of the divisions on particular traffic, reflecting the rates involved, permits an appropriate consideration of individual carriers, the Commission went on to review economic trends (A. 31-35). The facts found with respect to economic trends and rates of return appeared to indicate a

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2. The Southern lines' characterization of their traffic study from p. 187 of their brief before the Commission is as follows:

> "The Southern lines' traffic study accurately measures the transportation characteristics of the precise traffic against which the Docket 29885 equal factor divisions were prescribed to apply, and against which any prescribed change in those divisions would hereafter apply. The Southern lines' traffic study, presented by Witness W. W. Wolford, provides the most current data available with respect to the normal annual movement of Official-Southern traffic and supplies all the traffic data required for the Commission's determination of just, reasonable and equitable divisions.
>
> "The utilization of modern data processing equipment and techniques has permitted the Southern lines to develop the most complete information pertaining to the movement of Official-Southern traffic ever presented to the Commission. This information shows the services performed and revenue received by each carrier participating in the movement of the precise traffic at issue. It measures the participation of Class I and Class II railroads individually and as groups, in each territory, and shows the relative importance of Official-Southern revenues and ton-miles to the railroad groups and individual carriers (V.S. 36, Exs. 4 and 5). The distribution of revenue by mileage blocks north and south of the gateways is shown (V.S. 11, Ex. 2). [A. 600-712] Other information provided by the Southern lines' traffic study includes the volume and consist of Official-Southern traffic, average hauls, distribution by gateways, states of origin and destination, and similar information (V.S. 11 and V.S. 11A)."

greater revenue need on the part of Northern than of Southern lines. But the Commission found no warrant for adjustment of the divisions from those based upon the relative costs of service (A. 78-79).[3]

The Commission next found that both groups are being operated efficiently (A. 37-39) and then reviewed the subject of relative cost of service. It began this discussion by quoting the statement made when prescribing the then existing divisions (those prescribed in the 1953 report) that:

> "'. . . it is to be the safest assumption for the future upon the facts before us that neither contesting group will have an appreciably lower basis of operating costs than the other, . . .'" (A. 39).

The Commission stated, with reference to the case now on appeal, that the basic formula used by both Southern and Northern lines was Rail Form A, a formula devised by the Commission's Cost Finding Section and entitled "Formula for Use in Determining Rail Freight Service Costs." It first considered the Northern lines' contention that the costs north of the dividing points should be ascertained on the basis of the costs of the Eastern District roads alone, rather than including with those costs those of the railroads of the Pocahontas Region. Had this point been resolved in favor of Northern lines, the prescribed divisions would have been substantially higher than those fixed by the Commission (A. 47). But the Commission decided the issue in favor of the Southern lines (A. 42).

At (A. 46) the Commission noted that:

> "The southern lines urge that it is settled law that relative service costs are the decisive measure in determining just and reasonable divisions . . ."

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3. In fixing higher divisions for Southern lines in the earlier cases, the Commission had relied heavily upon their then greater revenue needs. See, *e.g., Baltimore & O. R. Co. v. U.S.*, 298 U.S. 349, 361 (1936).

The basic unit costs used by both Northern and Southern lines were shown to be the Form A average costs for Southern and official territories for the year 1956, with Southern lines advocating 12 adjustments therein. Each of these adjustments was analyzed in great detail in Appendix B to the Commission's report, wherein the Commission accepted five of Southern lines' adjustments and rejected the others (A. 87-129). In the following table from the report (A. 48-50), the Commission set forth its restatement of the costs:

"

*Restated Costs*

| *All traffic* | *Official territory* | *Southern region* |
|---|---|---|
| Revenue as settled | $221,430,341 | $274,656,425 |
| Percent | 44.64 | 55.36 |
| Fully distributed costs—unadjusted | 169,617,543 | 194,306,309 |
| Percent | 46.61 | 53.39 |
| Adjustments: | | |
| Exclude platform costs | —2,254,075 | —453,673 |
| Way and thru train separation | —2,283,259 | —3,595,230 |
| Switching and terminal Companies | —163,473 | +1,039,610 |
| Include short line (class II railroads) costs | —37,725 | +529,347 |
| Train tonnage—Pocahontas region | +867,319 | 0 |
| Total adjustment (net) | —3,871,213 | —2,479,946 |
| Fully distributed costs—adjusted | $165,746,330 | $191,826,363 |
| Percent | 46.35318 | 53.64682 |

"

Thus the Commission's restatement of the costs showed that whereas the lines north of the dividing points received 44.64% of the revenue on the traffic involved, they incurred over 46.35% of the cost of performing the service. The great extent to which the evidence that produced these results was evidence of the Southern lines was noted by the Commission (A. 48):

> "Our restatement is based on official territory (eastern district plus Pocahontas region) costs north of the breakpoints, for reasons previously discussed, [the "alternative urged by the southern lines,"; A. 42] and is at the fully distributed level,[4] as advocated by both groups, on all traffic. Apart from the adjustments rejected in appendix B, our restatement is based on the southern lines' cost computation, as applied to their traffic studies, which, we find, more reliably and accurately reflect the movement of the traffic in question."

After reviewing contentions of the Conferences, the Commission found that there were no differences in the importance to the public as between the contending groups of railroads (A. 50-51).

The Commission next discussed a major issue, which related to the points over which the rates should be divided. In its first 1953 decision the Commission had found that the divisions should apply to and from actual points of interchange between Northern and Southern lines rather than at so-called territorial borders. On petition of Southern lines urging that this conclusion would cause a loss of $6 million annually to them the Commission reinstated the territorial boundaries as the dividing points, 289 I.C.C. 4, 7-8. In the present case the Northern lines strongly urged that the dividing points should be at the actual points of interchange; but the Commission concluded this major issue

4. "As found appropriate in *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, 660, sustained in *Carolina & N. W. Ry. Co. v. United States*, 230 F. Supp. 581 (W.D.N.C. 1964)."

against them (A. 52-56). It likewise decided in favor of Southern lines the issue as to whether or not a 15% minimum division which had been applied in the past should be continued (A. 64).

Beginning at A. 75, the Commission set forth its general discussion and conclusions. It stated that both on the basis of precedent and the position of the parties in the present litigation, relative service costs constitute a prime factor in determining the fair and equitable share of joint revenue to be received by the carriers involved. At A. 78 it stated:

> "Our restatement of the costs, which are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, shows that the cost level in 1956, the year both groups used in the final cost analysis, is somewhat higher in the North than in the South for like services. A consideration of all factors indicates that this situation will most likely continue in the immediate future."

The Commission then pointed out that both groups of carriers also relied upon revenue needs in claiming that they should have a greater share of the joint revenue than accorded by the present divisions. At A. 78 the Commission stated that in every divisions case evidence relating to revenue need is material because Section 15(6) of the Interstate Commerce Act requires that due consideration be given, among other things, "to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." Then it stated, at A. 78, that:

> "We are thereby authorized 'to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property,' as well as 'the reve-

nues, expenses, taxes and returns attributable to the service covered by the divisions under consideration.' *Baltimore & O. R. Co. v. United States,* 298 U.S. 349, 360, 370 (1936). We are free to give such evidence the weight which the particular circumstances appear to justify.''

Immediately thereafter the Commission stated that in this case it had considered evidence relating to the cost and other factors ''concerning the public interest in maintaining all essential parts of the transportation system.'' It found (A. 79) that no factor offered a concrete basis on which to find that either group is entitled to a share of the joint rates larger than that which would result from divisions prescribed on the basis of relative costs. It stated that:

''. . . our prescription of divisions based on relative costs includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved. *Cf. New England Divisions,* 66 I.C.C. 196, 199.'' (A. 79)

At A. 79, the Commission concluded:

''. . . weighing the cost evidence of record in the same balance and similarly considering it, without particular solicitude, we are of the opinion and find that it affords a reasonable basis for the exercise of a practical judgment. Stated in another manner, everything else being substantially equal, the relative costs of the parties reflecting their respective operations as to this traffic can properly serve here as a guide for the determination of just, reasonable, and equitable divisions. *Cf. Louisville & N. R. Co. v. Southern Ry. Co.,* 319 I.C.C. 639, at pages 657-658.[5]

5. Affd., *Carolina & Northwestern Ry. Co. v. U.S.,* 234 F. Supp. 112 (W.D., N.C., 1964); Aff'd 380 U.S. 526.

Since the evidence in the test year showed that the Northern lines received 44.64% of the revenue and incurred over 46.35% of the costs, the Commission found it:

> ". . . clear that an adjustment in the divisions is required to compensate the respective groups according to their expenditures in the joint effort of handling this interterritorial traffic. To the extent that the present divisions do not meet this test, they are unjust, unreasonable, and inequitable." (A. 80)

The Southern lines had asked the Commission to prescribe scales of divisional factors based upon costs, using the method adopted in *Louisville & Nashville R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, and they pointed out that, to the extent that the Examiners were found to be correct in their rejection of specific aspects of the Southern lines' cost evidence, the cost evidence as thus modified would provide the basis for constructing the divisional scales (Southern lines' exceptions, A. 1361-1363). The Commission agreed; and after accepting five of Southern lines' proposed adjustments and rejecting others, it prescribed the new divisions on the basis of Southern lines' cost evidence as thus modified, citing *Louisville & Nashville* (A. 48-49, 63, 79-80).[6]

The Commission found that based on Southern lines' traffic study for 1956 the prescribed scales would increase Northern lines' revenue divisions by $7,948,004, and decrease Southern lines' divisions correspondingly (A. 80). The formal ultimate findings condemning the present divisions as unjust, unreasonable, and inequitable, and prescribing just, reasonable, and equitable divisions for the future appear at A. 81-83.

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6. Because of a special situation, the Commission deviated from the prescribed scales to give a more favorable basis to the Norfolk Southern Railroad, a Southern line, and upon petition of that line it gave it an even more favorable basis in the supplemental report on further consideration (A. 176). Otherwise, the conclusions in the February 3, 1965 report were affirmed in the supplemental report, which was dated May 18, 1965.

**III. Proceedings in the Court Below.**

On March 31, 1965, the Southern lines filed suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, praying that the order of the Commission prescribing the new divisions be enjoined and set aside. Contemporaneously, plaintiffs filed an application for an interlocutory injunction and, if needed, a temporary restraining order. This resulted in the granting of a temporary restraining order, but following hearing before the three judges on plaintiffs' application for interlocutory injunction, the temporary restraining order was dissolved and the application for interlocutory injunction was denied subject to conditions for refunding the money involved to Southern lines in the event they should be successful in permanently setting the order aside. As a consequence the newly prescribed divisions became applicable as of April 20, 1965, the effective date of the Commission's order (A. 131-132).

The District Court disregarded the findings of the Commission concerning the adequacy, reasonable accuracy and reliability of the data on the relative costs of handling the traffic involved on which the Commission had relied and held such data insufficiently refined to support the Commission's order, and for this reason it found the order to lack the support of substantial evidence and adequate findings. It held that the Commission was obligated to develop, or to require the parties to develop, more refined cost data described by the Court as the "actual costs of handling the specific traffic at issue." (A. 354) It decreed that the Commission's order be set aside and that the cause be remanded to the Commission for further proceedings.

In its opinion, the court below—with apparent lack of appreciation of the years of work necessary to prepare traffic and cost studies of the completeness of those here of record, to say nothing of the more refined cost data envisioned by it—suggested (without purporting to require)

that a new traffic study as well as a new study of costs which would meet the views of the court as to the "actual costs" of handling the specific traffic might well be warranted (A. 356).

Under the protective conditions attached to the District Court's denial of an interlocutory injunction, which are carried forward by its order staying decree (A. 169-171, 359), Northern lines would be obligated, in the event the Commission's order is permanently set aside, to resettle their accounts with Southern lines on all shipments made on and after April 20, 1965, with interest. As of April 20, 1968, this represented a principal amount of some $25,000,000 to be paid Southern lines by Northern lines.

## SUMMARY OF ARGUMENT.

### I.

The Southern lines contended before the Commission that relative service costs are the decisive measure in determining just and reasonable divisions. They urged the Commission to determine such costs on the basis of the territorial costs for Official and Southern territories, respectively, as developed by the Commission's Cost Finding Section's Rail Form A formula as modified by 12 adjustments which they proposed.

After a comprehensive examination and discussion of each of the proposed adjustments, the Commission adopted 5 of them and rejected the remaining 7. The unit costs as thus derived from the Southern lines' evidence were applied by the Commission to the Southern lines' traffic study, which they said accurately measured the transportation characteristics of the precise traffic involved.

The Commission found that the costs as thus restated by it are "reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis . . ." (A. 78).

The Southern lines asked the Commission to base the divisions to be prescribed on their cost evidence as modified to the extent that any of their proposed adjustments were rejected. The Commission did precisely that.

Upon suit by Southern lines, the District Court held that the costs upon which the Commission acted should have been more refined and that the Commission was obliged to require the development of what the Court described as the actual costs of handling the specific traffic at issue, rather than to rely on territorial average costs.

The District Court thus substituted its judgment for that of the Commission on the purely administrative and complex factual question as to the representative character

of the cost evidence. In so doing, it acted contrary to numerous decisions of this Court with respect to the judicial review of cost evidence, e.g., *Illinois Commerce Commission v. United States,* 292 U.S. 474, 481 (1934); *New York v. United States,* 331 U.S. 284, 328, 331, 335 and note 33 (1947); *Chicago & N.W. R. Co. v. A., T. & S.F. R. Co.,* 387 U.S. 326, 356 (1967).

If allowed to stand, the Court's decision would seriously interfere with the Commission's use of cost formulae widely employed by the Commission and parties appearing before it in daily practice. The District Court's decision also rests on an assumption as to the function of the reviewing court which, if applied generally, would mean that the technical problems involved in determining transportation costs would not be determined uniformly by the expert judgment of the agency charged with the administration of the National Transportation Policy, but by the varied views of the numerous District Courts which have jurisdiction to review Commission orders.

Finally the decision of the court below requires a cash payment of $25 million, plus interest, by the railroads in the northeastern part of the country, which include some of the most necessitous carriers of the nation, to the Southern lines, and an immediate reduction in Northern lines' divisions to the extent of approximately $8 million a year, at least until the Commission could undertake a new investigation in a futile search for "actual costs," which would consume additional years of litigation.

## II.

The action and conclusions of the District Court are directly contrary to this Court's recent decision in *Chicago & N.W. Ry. Co. v. A., T. & S.F. Ry. Co., supra,* which involved an I.C.C. order prescribing divisions of joint rates between Mid-western and Transcontinental (far-western) railroads. Indeed, the cases are so similar that Appellees, the Southern Governors' Conference, et al. (which have

been allied with the Southern railroads throughout this litigation) filed a brief as *amici curiae* in *Chicago & N.W. R. Co.* and stated that the Commission's cost findings in the case here on appeal reflect the same approach used by the Commission in the *Chicago & N.W.* case, and that there, as here, although the asserted basis of the Commission's action was the relative cost of performing the service involved "the Commission relied almost exclusively upon the average costs of handling all traffic in these territories in reaching its conclusions." And there, as here, virtually every objection to reliance upon such territorial averages was brushed aside without either findings or evidence to support such action."

This Court held in *Chicago & N.W. R. Co., supra,* that the Commission's "factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry" and that the Commission's conclusions "had reasoned foundation and were within the area of its expert judgment" (p. 356).

The present phase of the litigation over divisions on north-south traffic has been before the Commission and the Courts for about 11½ years, and the initial phase thereof began about 21 years ago. This Court's reference, in *Chicago & N.W. R. Co., supra,* at 356, to the long time which elapsed from the time the complaints in that case were first filed and its indication of the necessity of bringing the litigation to an end (p. 356) are applicable with equal force in the present case.

## III.

The District Court enunciated its difference of opinion with the Commission as to the significance of the cost evidence in terms of lack of substantial evidence and findings. There is abundant evidence, reviewed hereinafter, to show that the use of territorial unit costs (with such modifications as the Commission allowed) as applied to

a traffic study showing with precision transportation characteristics of the traffic involved was justified in this case, which deals with all traffic, other than coal and coke and certain trailer-on-flatcar traffic between every station in Official territory and every station in Southern territory over all Northern and all Southern railroads.

Moreover, the insistence of the Court below that the Commission determine the "actual costs" of "the specific traffic" sets up a standard that is illusory and impractical. Of necessity, the cost of any shipment or category of shipments represents an apportionment of expenses incurred in providing and maintaining facilities and conducting operations. The practical impossibility of securing "actual costs" as to any category of traffic was recognized in *New York v. United States,* 331 U.S. 284, 328, 335 and note 33.

## IV.

In their opening cost evidence, the Northern lines excluded the entire amount of the deficit from passenger operations incurred by the Northern and Southern railroads, respectively. Southern lines objected to this and contended that Northern lines' study of the cost of the service involved was defective in computing constant costs without consideration of passenger deficits.

Although the inclusion of passenger deficits was to Southern lines' advantage, Northern lines did not object to such inclusion, but did object to Southern lines' contention that the Commission should cull out of the passenger deficits that part thereof which is attributable to commutation service, of which there is relatively little in the South. Southern lines contended that the commutation service is almost entirely rendered on facilities that are not used in the rendition of any service other than commutation but that intercity passenger service almost entirely uses facilities that are used also for freight and that, on this basis, the deficit incurred in the performance of commutation

service should be excluded but the remaining passenger deficit included, in computing the cost of the North-South freight service.

The Commission found that while some elements of the cost of rendering commutation service are incurred solely in connection with that service the facilities on the whole could not be considered solely related to suburban service and treated entirely apart from freight and intercity passenger service. It concluded that the suburban deficits should not be excluded from the constant costs and it included a pro rata portion of the entire passenger deficit for both Northern and Southern lines, basing its figures upon the cost evidence submitted by Southern lines before the exclusion of suburban deficits.

The Court below found that the Commission erred in including suburban deficits because it said there was neither findings nor evidence to relate such deficits to the Commission's standard for decision, i.e., the relative cost of performing the North-South freight service involved. The fact is, of course, that it is in the very nature of overhead, or constant costs, that they are not incurred in the performance of the service to which they are apportioned. *New York v. United States,* 331 U.S. 284, 316 (1947). But the District Court dismissed the Northern lines' point that these costs are treated as overhead, or constant costs, the allocation of which is required because of the need for revenue from freight service to continue passenger operations. It said that the Commission did not so treat them since it rejected contentions of both groups of railroads for divisions over and above the cost of service on the ground of revenue needs.

The District Court plainly erred in this holding. The Commission stated that its prescription of divisions based upon relative costs included allowances for overhead and return thus reflecting a due proportion of the burden of maintaining the financial integrity and credit of the carriers and that accordingly it found no justification for add-

ing "any special increment" favoring one group of carriers over the other. Included in the allowance for overhead, of course, were the passenger deficit figures for Northern and Southern lines.

The Court's holding that the Commission could consider only those expenses of performing commutation service which are common to freight and passenger has no basis in the decisions of the Commission or of this Court. *Increased Freight Rates, 1948,* 276 I.C.C. 9, 32-39 (1949); *King v. United States,* 344 U.S. 254, 260 (1952).

It is important to note that the Northern lines' entire passenger revenues exceeded the expenses that are solely related to the performance of passenger service as a whole and that they experienced a deficit on passenger operations only when a portion of the expenses that are common to freight and passenger was assigned to the passenger service, but that the Southern lines' passenger revenues are exceeded by the costs solely related to the performance of passenger service alone. In the calculation of the cost of the North-South freight service, therefore, the net result of the Commission's action was to allocate to the Southern lines a deficiency of solely related passenger expenses under passenger revenue as well as the additional deficit resulting from the allocation of common expenses to the passenger service, while the passenger deficit included for the Northern lines resulted from the apportionment of common expenses alone. Overall, therefore, the lower Court's view that it was proper to apportion to the freight service involved only that part of the passenger deficit which resulted from the allocation of common expenses was actually met as to Northern lines but not as to the Southern lines.

The District Court quoted from this Court's decision in *Chicago & N.W. R. Co., supra,* to the effect that while the Commission has sometimes offset passenger deficits in freight rate cases, the issues are different when, in a divisions case, it is argued that carriers in one part of the country should subsidize the passenger operations of car-

riers elsewhere, but that in the light of the fact that the passenger deficits were of negligible relevance to the Commission's decision there were no errors that would justify setting aside the order there involved.

Had the Commission not considered passenger deficits, the Northern lines' divisions would have been relatively greater than those prescribed for them by the Commission. The inclusion of passenger deficits, therefore, may be said to have resulted in Northern lines subsidizing Southern lines. There clearly was no error prejudicial to the Southern lines in the Commission's consideration of passenger deficits. As to those lines it was of "negligible relevance" (C. & N.W., pp. 350-351) except that its consideration gave them more than a million dollars annually above that which they would have obtained if passenger deficits had not been included in the constant costs.

## ARGUMENT.

### 1. The Decision of the District Court Exceeds the Bounds of Permissible Judicial Review.

After a comprehensive review of the evidence (A. 49-50, 87-129) the Commission found that Southern lines' evidence of territorial unit costs, with the adjustments adopted by the Commission, "adequately reflect the costs attributable to the traffic at issue" (A. 49-50) and are "reasonably accurate and reliable for the purposes of determining the relative contribution by the groups on a cost-of-service basis . . . ." (A. 78). The District Court, however, substituted its judgment for that of the Commission and declared that the costs relied upon were not sufficiently refined to sustain the order prescribing the divisions. The Court stated this conclusion in terms of lack of substantial evidence and of findings, but this asserted deficiency relates only to the difference between the Court's views and those of the Commission as to the adequacy of the costs used.

In so deciding, the Court below acted directly contrary to pronouncements of this Court with respect to the judicial review of cost evidence. Typical of this is *Illinois Commerce Commission v. United States*, 292 U.S. 474, 481 (1934):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts . . . ."

See also *B. & O. R. Co. v. United States,* 298 U.S. 349, 359 (1936) involving a divisions order, and *New York v. United States,* 331 U.S. 284, at 328, 331, 335, and note 33 (1947), where this Court was considering the Commission's initial reliance on Form A costs in *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945).

This rule was recently invoked in an opinion of this Court dealing with divisions of freight rates. In *Chicago & N.W. R. Co. v. A., T. & S.F. R. Co.,* 387 U.S. 326 (1967), it was stated (356):

> "The presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were thoroughly explored and contested before the Commission. Its factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment. *B.&O. R. Co. v. United States,* 298 U.S. 349, 359; *New York v. United States,* 331 U.S. 284, 328, 335, 349."[7]

Indeed, the facts with relation to the cost evidence in that case and in the present case are so alike that the decision therein constitutes a precedent of unusual significance for the disposition of the present appeals.

**2. The Decision Below Misconstrues and Is Inconsistent With This Court's Recent Decision in Chicago & N.W. R. Co.**

It is particularly surprising that the District Court decided as it did when it had the benefit of this Court's decision in *Chicago & N.W. R. Co. v. A., T.&S.F. R. Co.,*

7. *Chicago & N.W.* was cited and followed on this point in *Permian Basin Area Rate Cases,* No. 90, et al. October Term 1967 ( U.S. ) (Vol. 36 Law Week, No. 42, p. 4358, May 1, 1968).

387 U.S. 326 (1967) which was handed down only about one month before the decision of the District Court here on appeal and which held that cost evidence, admittedly substantially the same as that upon which the Commission acted in the present case, was sufficient to sustain the order there involved and within the area of the Commission's expert discretion. Indeed, the District Court could have decided this case by simply citing *Chicago & N.W.*

That the District Court misapplied and misconstrued the decision in *Chicago & N.W. R. Co.* would seem beyond dispute. There, in sustaining an order by which the Commission prescribed interterritorial divisions between Midwestern and Mountain-Pacific railroads, this Court considered and rejected contentions similar to those successfully advanced, through the same principal counsel, by Southern lines in the present proceeding. The District Court in the present case referred to *Chicago & N.W. R. Co.*, and stated that:

> "There, the Commission based its cost findings on a special cost study and analysis prepared by the Mountain-Pacific carriers and made certain adjustments which it considered more accurately reflected the true costs of the traffic involved. These adjustments (3) were derived from Rail Form A. The Supreme Court held that the attack on the legal validity of these adjustments to costs were unsubstantial. Here, of course, the entire inflation is pegged on relative costs derived from Rail Form A." (A. 349-350)

Thus, the District Court construed *Chicago & N.W. R. Co.* as involving Form A costs only to the extent of three adjustments. The fact is that there, as here, the basic cost study upon which the Commission relied was predicated upon Form A territorial averages, with certain adjustments advocated by Appellees (Mountain-Pacific lines) being allowed by the Commission and others rejected. This is clear

from the Commission's decision which was sustained in that case. *Akron, C.&Y.R. Co. v. Atchison, T.&S.F. R. Co.*, 321 I.C.C. 17, 29-53; 322 I.C.C. 491, 492-499. Indeed, the Commission concluded in that case that ". . . for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs" (322 I.C.C. at 50). The cost study prepared by the Mountain Pacific carriers to which the Court referred in *Chicago & N.W. R. Co.* at p. 352 was basically the Form A territorial averages with adjustments, just as the Southern lines' cost evidence in the present case consisted of the Form A territorial average costs, with adjustments. In that case (as pointed out on pp. 352-356) and in the present case the Commission allowed some of the adjustments and rejected others.

The cost issues in *Chicago & N.W. R. Co.* and those involved here are indeed so similar in character that the intervenors in the instant case—Southern Governors' Conference and Southeastern Association of Railroad and Utilities Commissioners—obtained leave to file a brief as *amici curiae* in the appeal in *Chicago & N.W. R. Co.* in order to present to this Court their contention that the cost issues in that case should not be decided by the Supreme Court, lest such a decision govern the decision of the District Court in the instant case. They stated in their *amici* brief of April 5, 1967, to this Court:

> "However, the Commission's cost findings in the *Official-Southern* case reflect the very same approach that it used in the *Transcontinental* case. There, as here, although the asserted basis of its action was 'the relative costs of the parties reflecting their respective operations as to this traffic' (325 I.C.C. at 50; see also 325 I.C.C. at 26, 56), the Commission relied almost exclusively upon the average costs of handling all traffic in these territories in reaching its conclusions. And there, as here, virtually every objection to reliance upon such territorial averages was brushed aside

without either findings or evidence to support such action." (pp. 2-3)

Likewise, the Mountain-Pacific lines in their memorandum of August 16, 1967, in support of a motion to the California District Court to clarify a passage in its decision (which was reversed in *C.&N.W.*) relating to the cost issues, stated, at page 14:

> "The decision in the *Official-Southern Divisions* case is especially relevant here since that case, like this one, involved the use by the Commission of Rail Form A territorial averages to measure the actual costs of handling particular traffic."

It is clear, therefore, that the basic cost evidence upon which the Commission relied in *C.&N.W.*—and not just a few adjustments therein—was made up of territorial unit costs based upon Rail Form A, and that the District Court in the present case misconstrued *C.&N.W.* in its attempted distinction thereof. In contrast to the District Court's substitution of its judgment for that of the Commission on the representative nature of those costs and the need for greater refinement, the Supreme Court in *C.&N.W.* applied the usual rule of judicial review by accepting the Commission's judgment on accounting problems which the Court said "concerned matters relating entirely to the special and complex peculiarities of the railroad industry." (387 U.S. 326, 356).

After holding in *Chicago & N.W. R. Co.* that these cost matters were within the area of the Commission's expert judgment, this Court pointed out that:

> "Thirteen years have elapsed since the complaints in this case were first filed. The appellees' attacks on the legal validity of the Commission's findings on cost are so insubstantial that no useful purpose would be served by further proceedings in the District Court. We conclude that there was no legal infirmity in the Commission's cost findings."

The initial phase of the present case began on July 17, 1947, almost 21 years ago, and the reopening of the case which inaugurated the present phase of the same litigation began with Northern lines' petition of November 2, 1956, about 11½ years ago. The lapse of time to which the Court adverted in *Chicago & N.W. R. Co.*, therefore, is a consideration which applies with at least as much force in the present case. It is respectfully submitted that the Court should conclude, as it did in *Chicago & N.W.*, that the cost findings were in the area of the Commission's expert judgment and without legal infirmity and it should finally bring this litigation to an end.[8]

**3. The Commission's Order Is Sustained by Substantial Evidence and Adequate Findings.**

In their motion to affirm, the Southern lines argued that Appellants seek to use "unadjusted territorial average costs" (Motion, 5) without any evidence that they measure the cost of controverted elements of the North-South traffic, and they quote from the opinion below that territorial average costs cannot be accepted "without further evidence for mechanical application to particular segments of traffic" (Motion, 8).

The fact that the Commission adopted five of the adjustments tendered by Southern lines, and the exhaustive analysis of these and the remaining controverted adjustments (taking up 26 pages of an appendix to its report) indicate how far removed its action was from a "mechanical application" of the Form A territorial costs.

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8: Referring to the lapse of almost eight years from the time at which the administrative proceedings began, this Court in the recent decision in *Permian Basin Area Rate Cases*, No. 90, et al., October Term 1967 (—— U.S. ——) (Vol. 36 Law Week, No. 42, p. 4358, May 1, 1968) also pointed out that very extended additional proceedings would doubtless be necessary to review questions relating, *inter alia*, to cost determinations and, following *C. & N.W.*, held that the factual findings and accounting problems concerned administrative matters, that no useful purpose would be served by further proceedings in the court of appeals, and that there was no legal infirmity in the Commission's findings (Law Week, p. 4358-9, May 1, 1968).

There is abundant evidence to support the use of the Form A costs as adjusted by the Commission. It should first be noted that, as the Commission stated in *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945), at p. 693:

> "There are different degrees of refinement in costs depending upon the purposes for which the costs are intended. The ascertainment of the costs of transporting a particular commodity over a single railroad or a group of roads, for instance, obviously requires more refinement in procedure than the calculation of relative costs for transporting all traffic, or important and well-defined segments of traffic, by territorial groups of carriers."

This case involved "the relative costs for transporting . . . important and well-defined segments of traffic, by territorial groups of carriers." The order of investigation itself put in issue the divisions of rates on all traffic (except, by common consent, coal and coke) between all stations in the whole of Official Territory and all stations in the whole of Southern Territory and over all the railroads of each territory. It was truly a case involving territory-wide traffic between the North and the South. The record showed that the North-South traffic of Northern and Southern lines constituted 10% of their combined traffic (V.S. 36; Ex. 5) (A. 796). This contrasted with much smaller portions of total traffic in other cases in which the use of territorial averages had been approved, such as *Class Rate Investigation, 1939, supra,* wherein the traffic moving under the rates involved constituted only 4.1% of the total traffic of the railroads (262 I.C.C. at 479).[9] The *Class Rate* decision was affirmed

9. Appellees have sought to escape the force of this comparison by suggesting that the Commission was concerned in the *Class Rate* case with finding territorial average costs of all traffic. As this Court pointed out, however, the orders involved "affect class rates and class rates alone" and that ". . . this proceeding pertains only to class rates, which move but a small percentage of the traffic"; 331 U.S. at 330 and 343.

in *New York v. United States*, 331 U.S. 284 (1947) after due consideration of the data based upon Form A territorial costs and the conclusions of the Commission with respect thereto (315-332).

The record also establishes that the interterritorial traffic involved is an inseparable part of the whole and possesses no transportation characteristics which are distinguishable from those of traffic generally, and that the method of railroad operation is such that the use of average territorial costs was appropriate to the traffic involved in this case (V.S. 8; A. 575). This evidence showed, *inter alia*, that in a test week North-South traffic moved in 45% of all the trains operated by the Eastern lines, and the witness concluded that it would be found, over a longer period, that every train operated by an Eastern line would participate in the transportation of Southern traffic. "The obvious conclusion to be drawn is that Southern traffic shares in the same service provided on traffic generally within Official Territory and is not restricted to any particular trains or categories of service" (V.S. 8, p. 9; A. 547).

The Southern lines themselves used the Form A territorial costs as the basis for their own cost study. In fact, approximately 89.45% of the total North-South costs attributed by the Southern lines to the traffic involved were unadjusted Form A territorial averages (computed from V.S. 40, 40A; A. 867, 875). This fact strongly suggests that the Form A average territorial costs were representative for the North-South traffic and that the adjustments proposed by the Southern lines were simply *ad hoc* restatements that were the result of the exigencies of their litigating position rather than of any genuine infirmity in territorial average costs.

The evidence also shows that Southern lines have employed Form A territorial average unit costs as appropriate to determine the cost of transportation of far narrower scope than that involved in the present case (V.S. 80, Sec. H; A. 953-957). Sufficient examples were supplied to illus-

trate how such territorial costs are used by Southern lines "as a matter of established practice month in and month out before the Commission" (A. 953).[10]

Again, the record contains comprehensive evidence to support the Commission's conclusions with respect to the seven adjustments which had been sought by the Southern lines and rejected by the Commission (e.g., V.S. 73, 76 and 80; A. 893-904, 911-931, 933-974).

After a detailed consideration of each of the cost adjustments sought by the Southern lines, the expert body concluded that, with the adjustments adopted, the Form A costs were adequate and reasonably accurate and reliable to reflect the costs attributable to the traffic at issue. All of these facts having been before the Commission, it cannot be said that its conclusion lacked support in substantial evidence. The contrary holding of the District Court can only mean that it disagreed with the Commission's appraisal of the significance of these facts. The Commission accepted them as showing that the Form A costs are reliable for use here; the District Court held that greater refinement was necessary. That was not its function.

Moreover, the insistence of the Court below (A. 354) that the Commission determine the "actual costs" of

10. Indeed, one of the principal Southern lines, the Illinois Central, employed such costs (with minor adjustments) in a current divisions case, *Illinois Central R. Co. v. Great Northern Ry. Co.*, I.C.C. No. 34699 (unreported, recommended report and order of October 27, 1966 adopted, with inconsequential changes, by Division 2 of the Commission on July 31, 1967). There it was stated that the defendant criticized the Illinois Central's use of Rail Form A as not tending to disclose the cost of handling the traffic in issue because, it urged, the formula is designed to portray broad, territorial costs. The case involved but one commodity. The Illinois Central was sustained. It was stated in the report that costs determined in a similar manner have been relied upon in other divisions cases involving a single commodity, citing a case involving two other prominent Southern railroads—each of which relied upon Form A costs with certain adjustments—(*Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, sustained in *Carolina & Northwestern Ry. Co. v. United States*, 234 F. Supp. 112 (W.D., N.C. 1964), affd, per curiam, 380 U.S. 526 (1965)).

"the specific traffic" involved sets up a standard that is illusory and impractical. Any given category of shipments uses terminals in common with other shipments, is handled by the same switching crews, moves over track and in trains maintained and operated for all traffic and in cars and by locomotives that are repaired in central shops. Of necessity, any shipment's cost is an apportionment of expenses incurred in providing and maintaining facilities and conducting operations.[11]

For many years before the establishment of the Cost Finding Section of the Commission and the development of Rail Form A the Commission had great difficulty in obtaining reliable costs for use both in divisions cases and other proceedings under the Interstate Commerce Act.[12]

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11. The practical impossibility of securing "actual rail costs" is recognized in *New York v. United States,* 331 U.S. 284, 328, 335, and note 33.

12. Thus, in *Divisions of Freight Rates,* 148 I.C.C. 457 (1928) the Commission stated (p. 477): "The greatest obstacle in securing a satisfactory record has been the difficulty of determining relative costs of service as far as the traffic in question is concerned." In the initial report in the instant proceeding, *Official-Southern Divisions,* 287 I.C.C. 497, at pages 506-507 (1953), the Commission, referring to a previous report in No. 24160, *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175 (1939) stated:

"At page 188 of the 1939 report we said:

> 'Some of the speculation and controversy necessarily arising in considering averages of this kind could be avoided if it were possible to separate terminal and line-haul elements of expense by some satisfactory method. The two contending groups agree that no such method has yet been determined, but in their statistical evidence they have presented some exhibits in which separations of this kind have been made more or less arbitrarily for purposes of illustration.'

"Shortly afterward we established a cost finding section which is now a part of our Bureau of Accounts and Cost Fnding, having as one of its objects the development of improved methods for determining transportation costs. After exhaustive investigation that section constructed what has come to be known as Rail Form A, a formula for determining railroad freight

At that time the Commission was to some degree at the mercy of litigants who made showings of costs on diverse bases always designed to support the particular position the litigants might then be taking.

The purpose of the organization of the Cost Finding Section and the development of Rail Form A was to arm the Commission with methods and directions for determining costs that were reasonably designed in accordance with generally uniform standards, and not simply contrived for some *ad hoc* litigating purpose.

The decision below threatens to impair these widely accepted methods that the Commission has independently developed for the determination of costs and to throw the subject back to the partisan presentations by the litigants.

This is not to say that the formula should not permit of necessary adjustments in appropriate cases. But it is the Commission, rather than the District Court, that should make the determination whether the adjustment is proper and appropriate to the case. It is that body which has the staff and the background of knowledge and experience necessary to make the judgments involved on adjustments proffered by litigants who have much to gain by their adoption.

Form A classifies the expenses of the railroads and reduces them to a unit basis by dividing the various classes of expenses by appropriate statistics, such as cars originated, tons, ton-miles, etc. This produces a cost per ton for some services, and costs per car-mile, per ton-mile or for other service units for other services, depending upon which unit is most appropriate. These unit costs are then applied to the units of service involved in the particular traffic, here the North-South traffic, which units are ascertained by making a traffic study. This application of the unit costs to the number of service units involved results in the appor-

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service costs, including a separation of the line-haul and terminal elements and a differentiation in respect of load and tare weights per car. The basic formula is described in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 571-88."

tionment of the railroads' unit costs to the exact units of service involved in the case at hand.

The basic principle of the Rail Form A formula is perhaps best described at page 81 of Senate Document No. 63, 78th Cong., 1st Sess., under the title "Rail Freight Service Cost Studies in the Various Rate Territories of the United States," (as taken from the statement of Dr. Ford K. Edwards, the Commission's head cost analyst and its chief witness in No. 28300, *Class Rate Investigation, 1939*, 262 I.C.C. 447, 571 and footnote 78):

> "The cost study is fundamentally based on the principle that the performance of transportation service requires the production of a number of homogeneous service units, such as gross ton-miles, car-miles, consignments billed, cars given an interchange switch, etc. The unit cost for such units are based solely on those expenses which vary directly with the performance of the unit in question. Expenses which were unaffected by the performance of service units, i.e., the constant or indirect costs, are set apart for a separate treatment. The cost study determines the quantity of service units of each kind consumed in rendering the service. This is based on the length of haul, net weight of load, tare weight of car, percent of empty return and whether carload or less than carload. The number of service units thus accumulated are then priced out at the territorial average unit cost per service unit. The aggregate of the costs thus determined constitutes the total out-of-pocket or assignable cost. The fact that unlike commodities are handled does not affect the accumulation of the quantities of homogeneous service units that are consumed in the rendition of the service. A gross ton-mile is a gross ton-mile whether it is made up of fertilizer, logs, cotton, or electric refrigerators. A car interchanged is a car interchanged regardless of whether it is furniture or coal. Hence, it cannot be said that the averages are produced by wholly unlike things

as the comparisons in cost are fundamentally limited to a comparison of the quantities of like service units. In short, the costs are a yardstick of the quantities of homogeneous service units required of the carriers in performing transportation services on various classes of equipment, various weights of loads with various percents of empty return, and various lengths of haul. The cost study is a measure of the relative work performed by the carriers in performing a given amount of transportation service. It evaluates in cents per hundredweight the influence of the transportation conditions insofar as they affect the cost of performing the service."

The costs developed under this formula were considered at length by this Court in *New York v. United States,* 331 U.S. 284, 315-340.

A particularly damaging aspect of the District Court's decision, obviously growing out of its unfamiliarity with matters of common carrier costs and administrative requirements, is the substantial extent to which the principle of its holding would cripple the ability of the Commission to administer the Interstate Commerce Act in proceedings in which cost data are customarily presented. The Court below has held that Form A territorial unit costs, as modified by the adoption of five adjustments advocated by Southern lines, did not constitute substantial evidence of the cost of the service involved in this case, which deals with transportation of virtually all commodities, over all railroads, between every station in the North and every station in the South.

This holding leaves nothing to the discretion of the administrative body. The Court below thus holds as a matter of law that territorial unit costs applied to the specific service units of a particular traffic cannot be accepted by the Commission, without further evidence, in arriving at its "opinon" (49 U.S.C., § 15(6)) that existing divisions are unreasonable and that the divisions prescribed

will be fair and equitable. But since the instant record contains such further evidence (A. 541-582) which the Court below noted (A. 343, n. 12) but disregarded, and since it likewise disregarded the adjustments of the Form A costs which Southern lines proposed and the Commission accepted and incorporated into the unit costs it employed and relied upon, the holding becomes a virtually absolute condemnation of the use or acceptance of relative costs for particular traffic—albeit important segments of traffic by territorial groups of carriers—based largely on the application of regional unit costs to the service units of such specific traffic. This holding is central to the court's decision.

In terms the opinion of the court below on this point refers to "a divisions case" (A. 348), but the principle announced is broad enough to relate to other types of issues before the Commission and to other types of carriers. Thus, the Rail Form A formula is but one of the formulas developed by the Commission's Cost Section for the determination of costs of common carriers subject to its regulation; others including Highway Form B and Barge Form C. The Cost Section has prepared numerous studies of regional cost data for both rail and motor common carriers.[13] The wide use and acceptance of these studies is indicated by the Commission in its Annual Report to the Congress for 1961, at page 153, and in that for 1967, at page 108.

Were the decision of the Court below to stand as to the legal inadequacy of rail costs ascertained by the application of territorial unit costs to the specific service units of the vast interterritorial traffic here involved, the same principle would apply with greater force where the particular traffic was of lesser volume and scope. It would also condemn the use of the system average costs of a single carrier as applied to particular traffic movements over that line although (contrary to the assumption of the District Court, which regarded Form A as being designed to develop territorial

13. See, for example, I.C.C. Annual Reports: 1949, p. 76; 1950, pp. 71-72; 1955, pp. 71-72; 1957, p. 107.

costs only) this is a use made of the Form A formula regularly before the Commission. The District Court's decision would also apply to the use of costs developed by the Commission's Cost Section for other types of carriers in determining costs of their particular traffic. The limitations that would thus be imposed upon the use of Form A either as applied to regional figures or the system figures of individual carriers is a limitation which would seriously hamper the Commission in the administration of the Interstate Commerce Act and the parties who appear before it. And in doing so it would put for nought the long established rule that "the Commission alone is authorized to decide upon weight of evidence or significance of facts." *B.&O. R. Co. v. U.S.*, 298 U.S. 349, 359 (1936).

**4. A Review of the Individual Cost Adjustments Considered in the Lower Court's Opinion Shows That It Went Far Beyond the Permissible Limits of Court Review and That the Commission's Conclusions Regarding Them Were Supported by Findings and Substantial Evidence.**

Extended discussion of each of the cost adjustments proffered by the Southern lines and rejected by the Commission is here unnecessary. But an indication of the serious error into which the District Court fell in failing to follow such precedents as *Illinois Commerce Commission v. United States, supra,* may be gained by reference to several of those proposed adjustments which were specifically the subject of the Court's findings.[14]

14. The District Court stated (A. 335) that it is uncontroverted that most elements of costs are no higher on Northern than on Southern railroads and that (A. 343) seven items account for the "entire inflation" of Northern costs over those of Southern lines. In fact, these statements were controverted (Brief for Intervening Defendant Railroads, p. 50, fn. 9). They are shown to be erroneous, for example, by the evidence showing higher wages on Northern than on Southern lines. Wages constitute the largest item of railroad expense. If Northern lines had the same wage levels as Southern lines, their total wage costs in 1956 would have been almost $58,000,000 less than they actually were (V.S. 80, Sec. F; A. 938-939).

The first which may be noticed is the Court's finding that the Commission's use of territorial averages for switching costs "rather than the specific costs" incurred with respect to North-South traffic, is not supported by reasoned findings or substantial evidence (A. 355). The adjustment of switching costs proposed by Southern lines purportedly was made to eliminate the effect of volume switching, i.e., the switching of multiple cars in a single unit, it being the Southern lines' contention that they had relatively more such cars moving within the South than the Northern lines had moving within the North, and that consequently the effect thereof should be excluded in determining the switching minutes (and, therefore, cost) applicable to the interterritorial traffic involved.

The Commission found that: "Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of the traffic moving to and coming from terminals in all parts of both territories" (A. 121), that the depressing effect of the switching of volume movements would be largely offsetting as between the two territories (A. 121), that the Southern lines' studies of switching within the South had weaknesses, both in the sample and in the studies themselves (A. 121) [15] and that Southern lines' switching adjustment within the North was not made on a basis comparable to that which they used within the South (A. 121). For these reasons the Commission concluded that Rail Form A territorial average switching costs measure the relative switching costs of the Official-Southern traffic more accurately than the switching costs computed by the Southern lines (A. 121).

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15. The evidence offered by the Southern lines with respect to switching within the South was based on a study of but 41 cars, out of a total North-South movement of 967,000 cars. The Southern lines' sampling expert declined to characterize the 41 car sample as representative (A. 999-1000). Moreover, the sample did not consist only of North-South traffic, and there were other defects in the study (A. 113-122).

The presence of "reasoned findings" and of substantial evidence in support of the Commission's conclusions concerning the Southern lines' proposed switching adjustment and the use of territorial average costs is clear (A. 113-121). The District Court's conclusion to the contrary is based purely upon the substitution of its judgment for that of the Commission on the question of whether the territorial switching minutes are representative for use here or whether they should be more refined (A. 347-349).

The Southern lines' adjustment for empty return ratios on boxcars was also specially mentioned by the District Court as illustrative of what the Court called the Commission's general approach (A. 346). Without discussing the Commission's analysis of this complex matter or making any review of the evidence, the Court quoted from the opinion of the single dissenting Commissioner (who agreed that Northern lines should have an increase in divisions, but not as much as the Commission allowed), and announced, as a conclusion of law, that the use of territorial average empty return ratios rather than the "actual empty return ratios for the North-South traffic in issue" was unsupported by reasoned findings and not based upon substantial evidence (A. 355).

The Commission discussed the empty return ratio adjustment fully (A. 101-110). The proposed adjustment with respect to boxcars was made by Southern lines in three steps. The Commission found, with respect to the first step, that the adjustment was "not adequately supported" and was, at best, "merely illustrative", that the adjustment for the second step "is in error" and that the third adjustment was "purely an unsupported assumption" (A. 108). Its conclusion was that ". . . the empty return ratios for both boxcars and refrigerator cars developed by the special studies of the southern lines are not as sound an estimate of the empty return incurred by the official-southern traffic as are the 7-day study territorial empty return ratios. The latter reflect the compilation of actual

data reported by the railroads on a comparable basis in each territory under an order of this Commission."[16]

It is manifest that the Commission made reasoned findings in support of the empty ratios which it used.

The third adjustment to which the District Court specifically adverted was that regarding deficits from commutation service. This will be discussed below (*infra*, p. 44 ff.).

It is interesting to note that in the case before the Commission, when it came to their proposed adjustment of car costs, the Southern lines abruptly departed from the position which they had emphatically maintained, namely, that the costs should be more refined than territorial averages in order to bring them closer to the North-South traffic involved in the proceeding. As to car costs, they advocated the use of the average car costs for all railroads in the United States in substitution for the territorial car costs of the Northern and Southern railroads. After making extensive findings (A. 94-101) the Commission rejected this proposed adjustment (A. 100-101).[17]

While the Court below did not separately discuss the remaining adjustments made by Southern lines which the Commission rejected, the Commission made all necessary reasoned findings supporting its rejection of them: namely, (1) count of cars interchanged, originated, and terminated (A. 91-94); (2) constant cost of transit commodities (A. 124-128); and (3) equalization of gateway interchanges (A. 128-129).

From the foregoing it will be seen again that the District Court simply disagreed with the Commission on the question of whether the territorial unit costs, as restated

16. A substantially similar conclusion of the Commission in connection with its rejection of a proposed adjustment of empty return ratios was noted and sustained by this Court in *Chicago & N.W. R. Co., supra*, at 352-353, 355.

17. The use of Form A territorial car service costs and the rejection of adjusted car costs was sustained by this Court in *Chicago & N.W. R. Co., supra*, (at 354).

by the Commission, were representative for use as a guide for the determination of the relative contribution by the respective groups of carriers in the transportation of North-South traffic.

The Court, in Conclusion No. 3 (A. 354) found that the Commission took no independent action to require "the development of more refined cost data" (A. 335), and it concluded that the Commission has a duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record (A. 354). The Commission, to whom is committed the duty of decision on this matter, found the cost evidence upon which it acted to be adequate, reasonably accurate, and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis (A. 49-50, 78). This conclusion was sustained by substantial evidence; the Commission had no duty to require the development of other evidence to supplant that which it found satisfactory. Such a duty could not be created by the lower court's substituting its judgment for that of the Commission as to the necessary degree of refinement in the cost evidence. *Illinois Commerce Commission v. United States, supra.*[18]

18. In Conclusion No. 7 (A. 355) the Court stated that the "typical evidence rule" requires evidence typical in character and ample in quantity with respect to the divisions and services performed under the particular rate being divided, and that the Commission must consider evidence of actual services performed on the particular traffic involved. By Southern lines own representation (see footnote 2 on p. 9, *supra*) in which the Commission concurred, the evidence on which the Commission acted accurately measured the transportation characteristics of the percise traffic involved. The Commission did not disregard the typical evidence rule, but found the evidence to be representative (A. 31). The District Court made its own appraisal of the evidence and disregarded the inferences and conclusions that the Commission drew from the facts. In those circumstances the District Court's invocation of the phrase "typical evidence rule" cannot obscure the fact that the Court simply substituted its own opinions on the weight and significance of the evidence for those of the Commission. This is not permissible under the established rules of judicial review.

**5. There Was No Error in the Commission's Treatment of Passenger Service Deficits.**

As is almost universally true on American railroads, the passenger revenues of the Northern and Southern lines are less than the expenses attributable to their passenger service. The excess of the expenses over the revenues is called the passenger deficit. The fully-distributed costs under Rail Form A include, in addition to the out-of-pocket costs (which latter are represented by 80% of the operating expenses, rents and taxes, plus a return of 4% after Federal income taxes on half of the value of the road property and the total value of the equipment) the remaining 20% of the operating expenses, rents and taxes, the passenger and less-than-carload operating deficits and a 4% return, after Federal income taxes, on the remaining half of the road property. These amounts that are necessary to bring out-of-pocket costs up to a fully-distributed cost level are distributed to the traffic in question on a pro rata ton and ton-mile basis. "In effect, the fully-distributed costs as thus computed, consist of the out-of-pocket costs plus an allowance which closely approximates the weighted average contribution per net ton-mile made by all traffic to the constant costs or overhead burden." [19]

In their initial evidence before the Commission, the Northern lines excluded passenger deficits of both Northern and Southern railroads from their fully distributed cost computations. But in their brief before the Commission (118; A. 1052-1053), the Southern lines stated:

"The Northern lines' fully distributed cost applications do not include passenger and less-carload

19. pp. 3, 4, *Rail Carload Cost Scales by Territories,* Interstate Commerce Commission, Bureau of Accounts, Cost Finding and Valuation, Statement No. 2-58. This was the statement used by the Southern lines in computing cost of service upon which, as adjusted, the Commission relied (A. 48). See also, *New York v. United States,* 331 U.S. 284, 315-332.

deficits or the return on property devoted to such services (V.S. 3, p. 8; Tr. R. 769-70), whereas the Cost Finding Section's applications of fully distributed costs include passenger and less-carload deficits, with an allowance for a 4 percent return on the property devoted to those services (V.S. 40, p. 12)."

Southern lines continued, at p. 120 of their brief (A. 1053):

"Accordingly, the Northern lines' study is defective in computing constant costs without consideration of passenger deficits, contrary to the practice of the Cost Finding Section."

Thus, it was the Southern lines that introduced the matter of including the passenger deficits in the costs to be considered in this case. They regarded these deficits as an essential element of the constant—or overhead—costs.[20]

Although the inclusion of passenger deficits was to the advantage of Southern lines, the position of the Northern lines was that while they had no objection to the allocation

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20. The record does not show the exact difference that would result from the elimination of the total passenger deficit figures that were allocated to the costs of the Northern and Southern lines respectively. The basic source of the cost data used by Southern lines is I.C.C. Bureau of Accounts, Cost Finding and Valuation Statement No. 2-58 (A. 48). On page 6 of that statement the passenger service deficits, including return, were shown to be the following percentages of the carload fully-distributed cost: Eastern District 11%, Pocahontas Region 6%, Southern Region 12%.

Official Territory is made up of the Eastern District plus the Pocahontas Region. Necessarily, therefore, the percentage for Official Territory would be less than 11%. However, the application of even the 11% figure to the total Official Territory costs shown by Southern lines (V.S. 40, Ex. B, p. 3, corrected) and the 12% figure to the Southern costs shown on that page would change the percentages of total costs North of the gateways from 46.61% to 46.89%, and South of the gateways from 53.39% to 53.11%. This increase North of the gateways of slightly over one-quarter of 1% would, if it were reflected in the cost scales, increase Northern lines' share of the North-South revenues ($496,086,766, A. 48) by slightly over $1,389,000 annually.

of passenger deficits as part of the constant costs of performing the service involved, they did object to the selective approach advanced by the Southern lines under which Northern lines' deficits from suburban operation would be excluded, while all of the Southern passenger deficits (except the suburban deficit of the Illinois Central) would be included in ascertaining the relative costs to the two groups of carriers of performing the North-South service involved. Northern lines thought it arbitrary and unfair for Southern lines to propose a deviation from the Commission's formula and practice to the end that the Southern lines' costs would reflect their deficit from performing passenger service between points in the South, while the costs of Northern lines would be stripped of that portion of their passenger deficit which results from their performing part of their passenger service.[21] In the suburban service, the Northern lines are operating trains in which the passengers are, for the most part, traveling between their homes and places of employment. The trains operated by the Southern lines are occupied by passengers who may be traveling for different purposes than the commuters in the North. But that fact is obviously without significance. In both cases a passenger service is being operated. In both situations the railroads are obliged by law to operate. In both situations a loss is incurred. In both situations there is a need for freight to make a contribution against the loss in order to continue the operation.[22]

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21. The court below (A. 344) said that "through the use of average costs", passenger deficits were included in the cost computations. It was not through the use of average costs that such deficits were included, but through the insistence of Southern lines that they be added, along with other overheads.

22. As this Court stated with reference to deficit passenger trains operated by the Southern Railway, "The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered." *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341.

The Interstate Commerce Commission's policy of taking passenger deficits into consideration in fixing freight rates was thoroughly reviewed in *Increased Freight Rates, 1948,* 276 I.C.C. 9, at 32-39. The lawfulness of the Commission's giving this consideration to passenger deficits was approved in *King v. United States,* 344 U.S. 254 (1952). That decision resulted from a proceeding instituted before the Interstate Commerce Commission by the principal Southern railroads, seeking to require an increase in Florida intrastate freight rates commensurate with that granted on interstate rates in *Increased Freight Rates, 1948, supra,* on the ground that the state rates discriminated against interstate commerce. The relief sought was granted by the Interstate Commerce Commission, and upon review this Court quoted as follows from the Commission's decision (261):

> ". . . if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations."

After referring to the fact that § 15a(2) of the Interstate Commerce Act (49 U.S.C. § 15a(2)) and the National Transportation Policy (preceding 49 U.S.C. § 1) direct the Commission to consider, among other things, the need of revenue to sustain efficient and adequate service, the Court concluded (p. 267) that there is no reason why the Commission may not give weight to passenger deficits in prescribing the intrastate freight rates in Florida, as it does in prescribing interstate freight rates for the southern territory.[23]

23. See also *Chicago, M. St. P. & P. R. Co. v. Illinois, et al.,* 355 U.S. 300, 307 (1958), and *Public Service Comm. of Utah v. U.S.,* 356 U.S. 421, 426 (1958).

In the proceeding here under review the Commission included a pro rata portion of the entire passenger deficit of the Northern and Southern lines, basing its figures upon the cost evidence submitted by the Southern lines before the exclusion of suburban deficits by them.

Upon oral argument in the Court below, the Southern lines admitted that they did not challenge the Commission's power to include suburban deficits and that they did not attack the Commission's consideration of such deficits from the standpoint of "policy" and, indeed, they admitted that deficits from suburban service might be considered, but only, they said, to the extent that they result from the apportionment of common costs (A. 242, 245).

The District Court found that the Commission erred in including suburban deficits because, it said, there was neither finding nor evidence "rationalizing the conclusion that suburban passenger deficits reflecting costs not common to freight service but 'solely related' to suburban passenger service can or should be treated as cost of North-South freight traffic," the Commission's standard for decision (A. 346, 354-355). The fact is, of course, that it is in the very nature of overhead, or constant, costs that they are not incurred in the performance of the service to which they are apportioned. *New York v. United States*, 331 U.S. 284, 316 (1947). But the District Court dismissed the Northern lines' point that these costs are treated as overhead costs, the allocation of which is required because of the need of revenue from the freight service to continue passenger operations. It said that the Commission did not so treat them, it having rejected contentions of both Southern and Northern groups for divisions over and above the cost of service on the ground of revenue needs (A. 345).

The Court plainly erred in this holding. Each group had contended before the Commission that in fixing the divisions the Commission should include an additive—over and above divisional shares based upon fully-distributed costs—for their general revenue needs. In rejecting these

contentions, the Commission made this finding, which was ignored by the District Court:

> "However, our prescription of divisions based on relative costs includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved. *Cf. New England Divisions*, 66 I.C.C. 196, 199. Accordingly, we see no justification at this time for adding any special increment favoring one group of carriers over the other." (A. 79).

The failure of the court to take note of that finding and to understand that by their very nature constant costs are not directly related to particular traffic led it to decide, erroneously, that there was no finding rationalizing the conclusion that the suburban deficits reflecting some costs not common to freight service but solely related to suburban service, should be treated "as cost of North-South freight traffic" (A. 346).

It should also be noted that the District Court's apparent theory (A. 344) that the Commission could consider only the deficit resulting from the apportionment of common expenses has no basis in the decisions of the Commission or of this Court.[24] In the Commission's leading case on the subject of passenger deficits, *Increased Freight Rates, 1948, supra,* there was no mention of any such theory. Moreover, the passenger deficit considered by the Commis-

24. The lower court said that it is "generally agreed" that intercity passenger deficits should be considered as a part of the cost of providing freight service because such deficits are usually the product of costs allocated to passenger operations from common facilities which must be maintained to provide freight service (A. 344). That statement on this complex matter is the court's, not that of the Commission. Indeed, in *Railroad Passenger Train Deficit,* 306 I.C.C. 417 (1959), the Commission considered contentions that passenger deficit figures are fictitious because of alleged shortcomings in its accounting rules and it found that evidence indicating the contrary "is of major significance and serves as a warning that common costs cannot be lightly dismissed" (pp. 415, 426).

sion in fixing the level of freight rates is the entire passenger deficit. The Commission considers overall rates of return from all operations (see, for example, *Increased Freight Rates, 1948, supra,* at pp. 18-24), and the increase in operating expenses due to wage, price and tax increases attributable to all services (see, *e.g., Increased Freight Rates, 1948, supra,* at pp. 20-24, and *Increased Freight Rates, E.W. and S. Territories, 1956,* 300 I.C.C. 633, at 641-647, 657-8).

In *King* there was likewise no mention of any limitation that the Commission might consider only so much of passenger deficits as result from the apportionment of common costs. In its opinion therein, the Court set forth a long quotation from the Commission's report, the essence of which was that if the passenger service cannot bear "its direct costs and its share of joint costs" (p. 261) the Commission has felt compelled to take the passenger deficit into account in fixing the freight rates and that:

> "Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations. Both may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be exacted from the one than from the other." (344 U.S. 261-2) [25]

The Court then referred to the statutory provisions which direct the Commission to consider the need, in the public interest, of adequate and efficient transportation service and the need of revenues sufficient to sustain such ser-

25. The Court observed on page 262 that the Commission's change of policy from non-inclusion to inclusion of passenger deficits in fixing freight rates was the "inevitable consequence of steadily increasing passenger operating costs," together with the growth of competition from automobiles. Obviously these increasing passenger operating costs were real costs and not such costs as Southern lines' witness referred to as a mere matter of "terminology" (V.S. 14, p. 13; A. 713).

vice. It found that the statute leaves no ground for a claim that the Commission may not give weight to passenger deficits "in prescribing *interstate* freight rates to meet overall revenue needs." (Emphasis by the Court) With that, the Court's consideration of the power of the Commission to give weight to passenger deficits in prescribing interstate freight rates was ended. And it had not so much as mentioned any such theory as Appellees advanced in this case, i.e., that the justification for considering deficits is that they result from common costs.

The Court then considered whether the Commission may give weight to passenger deficits when prescribing intrastate freight rates under Section 13(4), which prohibits discrimination against interstate commerce. The Court took notice of the Commission's observation that there was no justification for a difference in treatment as between the Florida intrastate freight traffic and interstate traffic, and that the passenger deficit matter "would become even more serious for interstate shippers if this burden were imposed entirely upon them . . ." (p. 265).

In comparing the interstate and intrastate situations, the Court observed, at page 265, that:

> "In Florida, moreover, the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules to transport perishable fruits and vegetables from Florida."

The Southern lines seem to suggest (Motion to Affirm, p. 19, fn. 16) that the entire case turned on that sentence. That it did not, and that Southern lines' suggestion is superficial in the extreme, will be evident from the most casual reading of the opinion. The sentence is immediately followed by the Court's statement that:

> "The Commission dealt with the freight and passenger revenues and properties of the Florida roads as a whole when determining the need for increases in interstate

freight rates. Nothing has been demonstrated which would demand different treatment of these properties in relation to the intrastate activities."

The Court concluded, at page 267, that:

". . . . there is no reason why the Commission may not give weight to passenger deficits in prescribing the intrastate freight rates in Florida, as it does in prescribing interstate freight rates for the southern territory."[26]

It was doubtless the Southern lines' realization that the *King* decision does not restrict the Commission's power to consider passenger deficits to those resulting from the apportionment of common expenses that induced them to concede in the lower court that they do not rest their suburban deficit point on any question of the Commission's power (A. 242, 245).

It should next be noted that the Commission found against Southern lines on a basic factual premise of their suburban deficit point. They had argued that this deficit could be eliminated by the discontinuance of commutation service, on the premise that suburban facilities are maintained solely for such service and are not used for freight or intercity passenger service (A. 123). After considering this contention, the Commission determined that although

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26. This Court has cited with approval its holding in *King* in at least two subsequent decisions; *Chicago, M., St. P. & P. R. Co. v. Illinois*, 355 U.S. 300 (1958), and *Public Service Comm. of Utah v. U. S.*, 356 U.S. 421, 426 (1958). In the former, the Court said, at p. 307:

"Passenger deficits have become chronic in the railroad industry and it has become necessary to make up these deficits from more remunerative services. The I.C.C. has recognized this practical reality of today's railroading and has changed its rate-fixing policy so that if interstate passenger service inevitably and inescapably cannot bear its direct cost and its share of joint or indirect costs, the I.C.C. feels compelled in a general rate case to take the passenger deficit into account in the adjustment of interstate freight rates and charges."

many individual items of suburban service can be considered solely related to that service the facilities and service as a whole cannot be considered solely related to suburban service and treated entirely apart from the freight service and intercity passenger service. It concluded, therefore, that suburban deficits should not be excluded from the constant costs (A. 124). The District Court held that the Commission was required "to determine how much of the railroads' cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service." (A. 345) But having found that the commuter service and facilities "considered as a whole" could not be regarded as solely related to suburban service it was reasonable for the Commission to treat the costs as it did, that is, in exactly the same manner as it treated the costs of all other passenger services.[27] Clearly, it was within the Commission's administrative competence to do so.

It is important to note that (unlike the Southern lines, whose passenger revenue was less than their expenses that are solely related to passenger service) Northern lines' passenger revenues exceeded the expenses that are solely related to the performance of passenger service as a whole and that they had a deficit only when a portion of the common expenses was assigned to the passenger service (A. 123). In the calculation of the cost of the North-South service, therefore, the net result of the Commission's action was to allocate to the Southern lines a pro rata share of a deficiency of solely related passenger expenses under passenger revenue as well as the additional deficit resulting from the allocation of common expenses to the passenger service, while the passenger deficit included for the Northern lines resulted from the apportionment of common expenses alone. Overall, therefore, the lower court's view

27. Intercity passenger service requires equipment and facilities which have no relation to freight service. It requires *inter alia*, passenger locomotives, passenger cars, coach yards and passenger terminals.

(that it was proper to apportion to the freight service only that part of the passenger deficit which resulted from the allocation of common expenses) was actually met as to the Northern lines but not as to the Southern lines.

The District Court (A. 346) quoted from this Court's decision in *Chicago & N.W. R. Co. v. A.,T.&S.F. R. Co., supra,* to the effect that while the Commission has sometimes offset passenger deficits in freight rate cases, the issues are different when, in a divisions case, it is argued that carriers in one part of the country should subsidize the passenger operations of carriers elsewhere, that if the Commission were to give controlling weight to passenger deficits in a divisions case, it might be appropriate to take more evidence on the matter and discuss it in greater depth than the Commission did in that case, but that in the light of the fact that there the passenger deficits were of negligible relevance to the Commission's decision, there were no errors that would justify setting aside the order there involved.

Controlling weight was not given to the matter of passenger deficits in the present case. Upon the insistence of the Southern lines an allocable share of the deficits was included in determining costs but the Commission essentially gave both groups of roads equal treatment. Moreover all that the Court said in *Chicago & N.W.* was that, where controlling weight is given to passenger deficits in a divisions case, it might be appropriate to take more evidence on the issue and discuss it in greater depth than the Commission did in that case (387 U.S. at 350). Here there was no issue between the parties as to whether passenger deficits should be considered. The only issue was on the validity of Southern lines' request that part of the deficit should be excluded from consideration. The Commission declined to make this adjustment. Unlike the *Chicago & N.W.* situation, there was no claim here of "unfair procedural surprise" (387 U.S. at 349). The parties introduced all the evidence they desired and, after adequate

discussion in its report, the Commission declined to eliminate the suburban portion of the passenger deficits.

Finally, if there was any subsidization of one group of lines by the other it would have to be said that the Northern lines, who are not complaining about the matter, subsidized the Southern lines whose divisional shares were made greater by the inclusion of passenger deficits in determining service costs.

From the foregoing, it will be seen that there was neither error nor prejudice to the Southern lines in the Commission's consideration of passenger deficits.

**6. In the Event of Remand the Prescribed Divisions Should Be Permitted to Continue in Effect Subject to Readjustments as Necessary to Protect All Parties.**

That the Commission's order is valid and should not be disturbed on judicial review is evident both on the face of the Commission's report and in the light of precedent, particularly the very recent decision in *Chicago & N.W. Ry. Co.* Appellants believe it likely, therefore, that the Commission's order will be sustained. As indicated above, however, if the order should be permanently set aside, Appellants would be required to refund more than $25 million, plus interest, and the former divisions would be reinstated at an annual cost of about $8 million to Northern lines until the Commission could again prescribe new divisions. Northern lines must, therefore, proceed with great caution, and suggest that in the unlikely event there should be a remand the prescribed divisions should be permitted to continue in effect subject to possible readjustment following the remand proceedings.

In the *C.&N.W.* case this Court referred to the fact that thirteen years had elapsed since the complaints which gave rise to that litigation were first filed and it then held that the attacks on the Commission's cost findings were so insubstantial that no useful purpose would be served by further proceedings in the District Court. It is about

twenty-one years since Northern lines began this proceeding, and approximately eleven years since they petitioned for its reopening on November 2, 1956. In contrast to the concern of the Supreme Court regarding the time consumed in the disposition of *C.&N.W.* (and see *Illinois C.R. Co. v. Norfolk and W.R. Co.*, 385 U.S. 57, 75 (1966) and *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 621 (1966)) the District Court here concluded its decision not only by ordering the case back to the Commission for the development of the "actual costs of handling the specific traffic at issue" (A. 354) but it suggested that the evidence upon which the Commission acted had become stale and that the reception of new evidence was in order (A. 356).

Under § 15(6) the Commission is without authority to prescribe divisions retroactively except in circumstances not here present. *Brimstone R.R. Co. v. United States*, 276 U.S. 104, 117-123 (1928); *United States v. Baltimore & Ohio R. Co.*, 284 U.S. 195 (1931). Accordingly, such further order prescribing divisions as the Commission might enter following a remand would of itself have force only prospectively from its effective date. Thus, whether or not the Commission's new order made any change in its original prescription, it would lack power to protect these Appellants for the entire period of years from April 20, 1965 to the effective date of its new order. Since there is nothing of record to suggest, and the Court below found nothing to warrant any inference, that development of the more refined costs it deemed essential would at all warrant lower divisions for Northern lines than those prescribed in the order under review, an additional loss to Northern lines, at the rate of some $8 million per annum for all years prior to the effectiveness of a new Commission order, may reasonably be assumed.

Thus it is entirely possible that if the Commission were required to give further consideration to this matter, the result would be the prescription for Northern lines of similar or substantially similar divisions to those here involved. But, as stated, the Commission would lack au-

thority to make a new divisions order retroactive so as to protect Northern lines for the large revenue losses they would suffer for the period April 20, 1965 until a new order could become effective for the future, following the remand proceeding.

It is respectfully submitted that this Court, in the event of remand to the Commission for further findings, should, therefore, employ the procedure it adopted in *Sec'y. of Agriculture v. United States,* 347 U.S. 645 (1954), in which it vacated the District Court's order and remanded the cause to the Commission for further administrative proceedings, but without invalidating the Commission's order or enjoining its enforcement, thus leaving the unloading charges fixed by the Commission's order in effect pending completion of the remand proceedings. A similar procedure here, in the event of remand, would protect the interests of all parties by assuring the application of such divisions as the Commission might ultimately prescribe to all traffic moving subsequent to April 20, 1965.

As an alternative to this procedure this Court, in the event of a remand to the Commission, could direct the lower court to retain jurisdiction to make an equitable resettlement of the divisions in the event that upon remand the Commission in a valid order prescribed new divisions for the Northern lines more favorable than the old divisions. Since this would involve the resettlement of accounts by the payment of some $25 million plus interest by Northern lines to the Southern lines and the use for a number of years (until the Commission could complete further proceedings and issue a new order) of the old divisions which the Commission had found unlawful, and thereafter, assuming the issuance of a valid order by the Commission, the retransfer of the moneys—plus additional moneys attributable to later shipments—to the Northern lines, this alternative would not seem to be as desirable as that of permitting the present divisions to remain in effect subject to an equitable resettlement of revenues upon the completion of the remand proceedings.

**7. The Contentions of the Southern Governors' Conference, et al. Are Without Merit.**

The Southern Governors' Conference and the Southeastern Association of Railroad and Utility Commissioners, hereinafter called "the Conferences," contend that even if it be conceded that the Northern costs were relatively higher than the Southern on the specific traffic involved, the Commission could not lawfully reflect them in higher divisions north of the gateways without first finding that such higher costs were the result of what the Conferences referred to as "inherent territorial disadvantages."[28] This restriction, or test, which they incorrectly charged the Commission with having adopted, has no basis in Section 15(6) or in any judicial construction thereof.

The District Court, while emphasizing that it was remanding the case to the Commission for other reasons, stated that upon remand the Commission should decide and dispose of this contention in accordance with the Administrative Procedure Act (A. 341-343), by which it apparently meant that the finding of the Commission with respect to the contention should be stated with greater clarity.

The Commission said, with respect to this argument, "Relying on *New York v. United States,* 331 U.S. 284, 315 (1947), the interveners also take the positon that natural disadvantages must be found in the North before we may increase the divisions of the northern railroads." (A. 51) This, of course, was a statement of the Appellees' contention. The Commission answered it by stating: "In essence, however, other factors being equal, cost differences gen-

28. While the Conferences do not attempt to define or describe what they would include within the scope of "inherent territorial disadvantages," it would appear that they would exclude virtually everything that might affect relative costs except physical or natural conditons such as topography, grades and curves, climatic conditions, etc.

erally are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories."[29]

This contention of the Conferences would forbid the Commission to act upon cost evidence until that body, through a process reversing the development of the costs, had investigated the causes of such higher costs and found that they stemmed from nothing but "inherent territorial disadvantages," a standard of obviously uncertain scope. Thus, having "marched up the hill" at the expenditure of much time, effort and money to produce the requisite Form A costs, the Commission in effect would have to "march down again" by making a tremendous factual inquiry into the causes of the higher costs. The Commission would thereby lose a great deal of the value and usefulness of Form A costs and be required to observe an illogical, wasteful and time-consuming procedure.

The justification offered the lower Court by the Conferences for judicial adoption of their contention concerning "inherent territorial disadvantages" was that other-

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29. The Commission then cited *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, at pages 646-47. At the cited pages, the Commission, consistent with its conclusion here, said, after describing contentions concerning operating conditions:

> "While an appraisal of the evidence regarding physical operations indicates that both the complainant and the defendant operate in mountainous terrain, there is no need to determine whether such transportation conditions are more favorable or onerous to one than to the other. The nature of the physical transportation circumstances is concededly reflected in the cost of operations. In this respect, the cost data hereinafter discussed form a sounder basis for a determination of the issue raised than any conclusions to be drawn from the numerous factual statements regarding operating conditions."

This decision was upheld in *Carolina & Northwestern Ry. Co. v. United States*, 234 F. Supp. 112; affirmed, 380 U.S. 526. Similar recognition that costs "reflect the totality of conditions under which the carriers in the respective territories operate" is found in this Court's decision in *New York v. United States*, at pp. 348-9.

wise the Commission might give undue weight to higher costs which were higher because of conditions such as inefficient operation. But there is no need for providing any such restriction on the Commission's authority to prescribe divisions. Section 15(6) as enacted by Congress already provides protection against the use of relative costs affected by inefficiency of operations. Thus, at the outset of the list of matters required to be considered, the provision requires that the Commission "shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated. * * *"

In this case the Commission has quite specifically given full attention to "efficiency of operation" (A. 37-39), and has definitely found (A. 39):

> "We find upon this record that northern lines' cost of service is not shown to be affected by purported waste or inefficiency. More affirmatively, we find that both groups are being operated efficiently and that neither group should be considered as more or less efficient than the other."

The Conferences presented argument concerning the possible future effects of mergers authorized or proposed. In this connection it may be noted that subsequent to the closing of the record before the Commission, the respondent Southern railroads, supported by the Conferences, sought further hearing for the purpose of submitting evidence concerning the effect of proposed combinations and consolidations of rail carriers in Official Territory upon operating costs and revenue needs of said carriers. In its order of December 27, 1962, denying said petition (A. 1157) the Commission concluded as follows:

> "*It further appearing,* That such combinations and consolidations are involved in pending proceedings before the Commission, in some of which the hearings have not been concluded, and that it cannot properly

be assumed at this time that all of the combinations and consolidations will be approved and consummated, as proposed;

"*It further appearing,* That even if all or some of the combinations and consolidations are approved and consummated, the effect thereof on operating costs and revenue needs of the carriers involved will not be ascertainable within a brief period after consummation;

"*And it further appearing,* That reopening these proceedings for further hearing would result in unjustified delay in the disposition thereof; therefore

"*It is ordered;* That said petition be, and it is hereby, denied, for the reason that sufficient grounds have not been presented to warrant granting the action sought."

The Commission's findings under the heading "importance to the Public" (A. 50-51) and its above-quoted findings regarding efficiency of operation were all the findings that it was required to make with respect to this contention of the Conferences. *Minneapolis & St. Louis R. Co. v. U.S.*, 361 U.S. 173, 193-4; *Chicago & N.W. R. Co. v. A., T. & S.F. R. Co., supra,* at 358.

In the Conclusion of its opinion (A. 355) the District Court used an expression to the effect that the prescribed divisions are "bound to cut deeply into economic relations . . ." This, apparently, has reference to the contention of the Conferences that the Commission's decision in the present case would result either in a substantial diminution in the quality of the rail service within the South or a substantial increase in freight rates.[30] The revenue reduc-

30. It should be noted in this connection that in some of the past North-South divisions cases the Commission prescribed divisional factors which, on Florida citrus, were as much as 85% higher, mile for mile, for the Southern lines than for the Northern lines and on

tion of Southern lines as a result of the order under review ($7,948,000, A. 80) is only 62/100 of 1% of the freight revenue of the Southern lines ($1,280,900,000, A. 776) for the year in which the Commission's calculations were made (1956). After an appropriate adjustment for income taxes, therefore, it would appear that the reduced revenue might be somewhere in the neighborhood of 1/10 of 1% of the gross freight revenue of Southern lines. Manifestly, therefore, these alleged apprehensions of the Conferences regarding a substantial increase in rates or a diminution of the service as a consequence of this divisions order are wholly without substance. The Commission considered the contentions of these Appellees and found that the prescribed divisions "can result in no unlawful injury to the south." (A. 51)

In their original brief to the Commission of June 17, 1961, at page 5, the Conferences stated:

> "The destruction of the equal factor divisional scales sought in this proceeding by the Northern railroads ultimately threatens the destruction of the uniform class rate scales which the South fought so hard to secure."

This concern of these Appellees is without foundation. Rates and divisions affect different relationships, are regulated under different statutory provisions, and are subject,

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traffic in general, 25% higher for Southern than for Northern lines. *Atlantic Coast Line R. Co. v. Arcade & A.R. Corp.*, 194 I.C.C. 729, 761-2 (1933), and *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 192 (1939). In the next decision, *Official-Southern Divisions*, 287 I.C.C. 497, the Commission equalized the factors and in the order under review, the Commission fixed higher divisional factors for the Northern lines than for the Southern. Contrary to the District Court's impression, there is clearly nothing novel about one group of lines having proportionately higher divisions than the other on North-South traffic. It is of the essence of the administrative function that the Congressional standards for Commission action under Section 15(6) may require it to change its orders from time to time in accordance with the facts which, upon investigation, it finds.

in their prescription, to different considerations. Rates involve shipper-carrier relations; divisions affect only inter-carrier relationships. Rates are regulated under portions of Sections 1, 2, 3, and 4 of the Act, while divisions are regulated under Section 15(6). Since enactment of the latter provision in 1920, it has been recognized as a provision made by the Congress whereby, in appropriate cases, the Commission could order disparate divisions out of rates which might be uniform in character or in measure of increase. *New England Divisions Case,* 261 U.S. 184, 191 (1923). In prescribing uniform *class* rates east of the Rocky Mountains in *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945), the Commission at pages 693-694 discussed the bearing of costs upon rates in part as follows:

> "Discretion and flexibility of judgment within reasonable limits have always attended the use of costs in the making of rates. Costs alone do not determine the maximum limits of rates. Neither do they control the contours of rate scales or fix the relations between rates or between rate scales. Other factors along with costs must be considesed and given due weight in these aspects of rate making. * * * [31]
>
> "Moreover, it has long been recognized that it is unwise from the standpoint of both shippers and carriers to attempt to reflect in any rate schedule or rate structure all the minute and unsubstantial variations in the costs of service that occur on different divisions or segments of the same railroad or between individual railroads or groups of railroads. The tendency has been, rather, to deal with average costs in such manner as to avoid needless rate variations and to permit the freest possible movement of traffic."

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31. Quoted by this Court in *New York v. United States,* 331 U.S. 284, 328, which sustained the Commission's order therein.

With reference to the Conferences' contentions concerning the prescription of differing divisions based upon relative costs, and the relation thereto to future rate levels, it is important to note that to the exent that there would be any difference in rates because of cost differences, the differences would be in favor of the Southern shippers. If higher costs are to be reflected in higher rates, it is Official Territory which would have the higher rates since the costs of the Official Territory railroads are higher. Thus the situation would be exactly the reverse of what it was when Southern transportation costs were higher and Southern shippers were required to pay higher rates than their Northern competitors.[32]

Finally, the insistence of the Conferences upon adherence to uniformity in divisions regardless of the change in basic facts which now show higher costs on the part of Northern lines than of Southern is quite at variance with the decisions of this Court as to the necessity of flexibility and adaptability on the part of administrative bodies. See, e.g., *American Trucking v. A., T. & S.F. R. Co.*, 387 U.S. 397, 416 (1967).

Referring to the contention of Southern interveners that the public interest required uniformity in these divisions, the Commission concluded (A. 50-51):

> "We recognize that the public interest must be considered and the importance to the public of the transportation services of the railroads is not a sectional concept. We are required under the act to preserve an adequate national system of transportation, and must therefore consider the public interest of all concerned. Such a consideration, however, does not by any means require a uniformity of divisions, nor can we find an

32. In fact, in the post-war general freight rate increase cases the Commission has several times granted increases which are higher within the North than within the South, or between the South and the North. See, for example, *Increased Freight Rates, E. W. and S. Territories, 1956*, 300 I.C.C. 633, 689 (1957).

affirmative virtue in it on this record. Cf. *Western Trunkline Case,* 225 F. Supp. at page 604. Moreover, as pointed out in *New England Divisions Case,* 261 U.S. 184, 191 (1923), section 15(6) was designed to help the weak 'by preventing needed revenue from passing to prosperous connections.' Thus, an adherence to uniformity as such, without a careful evaluation of the statutory criteria and the evidence of record, can hardly result in the fixing of just, reasonable, and equitable shares."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded to that court with instructions to dismiss the complaints.

Respectfully submitted,

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## APPENDIX A.

### Statutes Involved.

A. Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4), provides in pertinent part:

> It shall be the duty of every such common carrier establishing through routes . . . in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15(6) of the Interstate Commerce Act, 49 U.S.C. § 15(6), provides:

> (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint

or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

B. Section 8(b) of the Administrative Procedure Act, formerly 5 U. S. C. § 1007(b) and now revised and codified as 5 U. S. C. § 557(c), (80 Stat. 387), provides:

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act, formerly 5 U. S. C. § 1009(e), and now revised and codified as 5 U. S. C. § 706 (80 Stat. 393), provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.